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In The

Supreme Court of the United States

October Term, 1994

PAUL S. RICKETTS, SR. and KIMBERLY ROTH,

Petitioners,

vs.

CITY OF COLUMBIA, MISSOURI,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner, Kimberly Roth (nee' Stephens), was the estranged wife of Sonny Stephens in April of 1987. After she separated from her husband, Petitioner obtained orders of protection to prevent her husband from harassing her. In spite of these orders of protection, and in spite of consistent complaints by Petitioner and members of her family about death threats by the husband, the police department of Respondent, City of Columbia, Missouri, refused to arrest the husband. Finally, in April of 1987 the husband murdered Marge Ricketts, wife of Petitioner, Paul Ricketts, Sr., and mother of Petitioner, Kimberly Roth. In the same incident the husband abducted and raped Petitioner, Kimberly Roth. Petitioners proved that the inactivity of the Respondent's police department in their case was pursuant to a de facto policy of arresting assailants in cases of domestic violence far less frequently than in cases involving "stranger" assaults. The questions presented are:

I. WHETHER EVIDENCE OF THE DISPROPORTIONATE IMPACT ON WOMEN OF THE POLICE DEPARTMENT'S POLICY TO ARREST DOMESTIC ASSAILANTS LESS FREQUENTLY THAN OTHER KINDS OF ASSAILANTS SUFFICES TO PROVE GENDER DISCRIMINATION IN VIOLATION OF THE 14TH AMENDMENT.

II. WHETHER THE POLICE DEPARTMENT'S POLICY WAS A CAUSE OF THE MURDER OF MARGE RICKETTS AND INJURY TO KIMBERLY ROTH.

LIST OF PARTIES

The caption of the case contains the names of all parties.

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PETITION FOR WRIT OF CERTIORARI

Paul Ricketts, Sr. and Kimberly Roth respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App., *infra*, A1-A17) is reported at 36 F.3d 775. The opinion of the United States District Court

for the Western District of Missouri (App., *infra*, A18-A41) is reported at 856 F. Supp. 1337.

JURISDICTION

The United States District Court for the Western District of Missouri entered judgment as a matter of law on September 29, 1993. On October 11, 1994, the United States Court of Appeals affirmed the district court. Thereafter, on December 9, 1994, the Court of Appeals denied a timely Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides in pertinent part:

AMENDMENT XIV, SECTION 1

"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The pertinent statute is 42 U.S.C. § 1983 which provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. What Happened

In September of 1986 Kimberly Roth (nee' Stephens) left her then-husband, Sonny Stephens, and moved in with her parents, Paul Ricketts, Sr. and Marge Ricketts, at their home in Columbia, Missouri. Stephens was a convicted felon and had physically abused Ms. Roth. As a result Ms. Roth obtained an *ex parte* order of protection to prevent Stephens from harassing her. Despite this order Stephens continually threatened and harassed Ms. Roth and her family. On one occasion he openly brandished a shotgun, threatening to kill Ms. Roth and her family. In spite of repeated calls to the police department of Columbia, Missouri about this activity, Stephens was never arrested. Convinced that the police would not protect her, Roth eventually moved back in with Stephens.

In March of 1987 conditions worsened, and Ms. Roth again left Stephens and moved in with her parents. Roth again obtained an order of protection which prohibited Stephens from threatening or harassing her. Stephens again resumed his pattern of threatening and harassing

Ms. Roth and her family. The Columbia police department resumed its pattern of ignoring calls for help made by Ms. Roth's family. On April 7, 1987, Stephens broke into the Ricketts' home and shot Marge Ricketts, fatally wounding her. He also abducted Ms. Roth and raped her.

At trial Petitioners adduced evidence that the Columbia police department had a custom or de facto policy of not treating cases of domestic assaults (i.e., cases where the victims were spouses or cohabitants of the assailants) as seriously as "stranger" assaults (i.e., cases where the victim and assailant did not know each other). The likelihood of arrest in a stranger assault case was one and one-half to three times greater than in domestic assault cases. Over 90% of the victims of domestic assaults were women, while 80% of the victims of stranger assaults were men.

B. Proceedings Below

This action was filed on March 15, 1990, pursuant to 42 U.S.C. § 1983, seeking damages for the death of Marge Ricketts and injuries suffered by Ms. Roth. Petitioners alleged that the City's policy violated their rights to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution. Specifically, they claimed that the City's policy of affording less protection to the victims of domestic assaults constituted unlawful gender discrimination.

In March of 1993 the case went to trial, and on March 18, 1993, the jury returned a verdict in favor of Petitioners assessing total damages of $1,200,000. On motion of

Respondent the district court entered judgment as a matter of law for Respondent on September 29, 1993. In granting said judgment the district court found as a matter of law that Petitioners failed to prove that (1) the City's policy caused or contributed to cause the incident of April 7, 1987; (2) the policy was adopted by the City's final policy-making authority; and (3) the policy was intentionally discriminatory against women.

Petitioners appealed that judgment to the United States Court of Appeals for the Eighth Circuit. On October 11, 1994, that Court affirmed the judgment of the district court on two bases. Specifically, the Court of Appeals held that Petitioners failed to make a submissible case on the issue of whether Respondent was motivated in part by a discriminatory purpose in its policy of providing less protection to the victims of domestic assault, relying on *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). The Court of Appeals also held that Petitioners failed to make a submissible case on the issue of whether the City's policy was a cause of the death of Marge Ricketts and injuries to Kimberly Roth.

Petitioners filed a timely Petition for Rehearing. The Court of Appeals *en banc* denied that Petition on December 9, 1994. Judges Richard Arnold, McMillian, and Murphy voted to grant rehearing.

REASONS FOR GRANTING THE WRIT

I. THIS CAUSE PRESENTS AN IMPORTANT QUESTION OF LAW ABOUT THE CONSTITUTIONALITY OF A POLICY WHICH TREATS DOMESTIC ASSAULTS DIFFERENTLY THAN OTHER KINDS OF ASSAULTS WHEN THAT POLICY OVERWHELMINGLY AFFECTS WOMEN.

For centuries Anglo-American jurisprudence institutionalized the right of men to control the lives of women to whom they were married. As a means to perpetuate that control, a husband was granted the right to inflict physical punishment on his wife in what Blackstone called "the power of restraining her by domestic chastisement. . . . " 1 W. Blackstone, *Commentaries on the Law of England* at 444. This view was embraced in the United States in cases like *Bradley v. State*, 1 Miss. 156, 158 (1824), where the Supreme Court of Mississippi upheld a husband's "right of moderate chastisement . . . without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned."

Even after the law began to abandon the right of moderate chastisement, law enforcement officials were slow to arrest men who abused women with whom they lived. Some police departments had policy manuals which explicitly provided that, when encountering domestic violence, a police officer should "recognize the sanctity of the home" and end the "disturbance without making an arrest." Finesmith, *Police Response to Battered Women: A Critique and Proposals for Reform*, 14 Seton Hall L. Rev. 74, 84 (1983). Consequently, police departments tended to assign a low priority to the arrest of spouse abusers, Comment, *Gender Based Discrimination in Police*

Reluctance to Respond to Domestic Assault Complaints, 75 Georgetown L.J. 667, 674 (1986). As the *Final Report* of the Attorney General's Task Force on Family Violence noted in 1984:

> Clearly, [police] officers regularly classify serious assaults between strangers as felonies and make appropriate arrests. Yet when the same level of injury occurs between family members, officers have been inclined to treat the crime as, at most, a misdemeanor and failed to make an arrest.

Ibid., at 23. Emergency calls involving spousal assault were "usually given a low priority because police have traditionally reflected community attitudes which considered violence within the family a private, less serious matter than violence between strangers." *Ibid.*, at 19.

By the early 1980s the incidence of family violence was epidemic. According to one study, approximately one of every six adult women in the United States had been battered at some time, *Police Response, supra*, 14 Seton Hall L. Rev. at 77. It was estimated that "between 55 and 65 percent of the married population . . . engages in spouse abuse." *Ibid.*, at 77-78. President Reagan's Commission on Law Enforcement and Administration of Justice announced in 1982 that "family altercations . . . are probably the single greatest cause of homicides" in the United States, cited in *Police Response*, supra, 14 Seton Hall L. Rev. at 78. In 1979 40% of all women killed were murdered by their partners, *Ibid.*, at n. 30.

The victims of spouse abuse are overwhelmingly women. The various terms used to describe domestic violence – spouse abuse, marital violence – are virtually

synonymous with "wife beating," Comment, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 Yale L.J. 788, 799 (1986). Nationally, 95% of the victims of domestic violence are women, Note, *Will the § 1983 Equal Protection Claim Solve the Equal Protection Problem Faced by the Victims of Domestic Violence?*, 29 J. Family Law 635, 644 n. 61 (1990-1991). One commentator concluded:

> The fact that we generally understand such terms as "marital violence" and "spousal abuse" to mean "wife abuse" or "wife beating" reflects society's acknowledgement that the overwhelming impact of domestic violence has fallen on women.

Gender Based Discrimination, supra, 75 Georgetown L. Rev. at 671-672.

The experience of Columbia, Missouri tracks with that described above. According to expert testimony presented by Petitioners, arrests were made in 33.3% of all stranger assaults in Columbia as opposed to only 18% of all domestic assaults. Where offenders were present when police arrived, arrests were made in 62.2% of stranger cases versus 29.4% in domestic assaults. Where the victim wanted an arrest made, 57.5% of the stranger assaults resulted in arrests; only 26.2% of domestic assailants were arrested when the victim sought arrest.

The victims of domestic violence in Columbia were nearly always – over 90% of the time – women. In contrast women were victims of stranger assaults less than 20% of the time.

The inevitable consequence of the Columbia policy was to treat crimes against a clearly identifiable class of its citizens less seriously than when those crimes were committed against victims of other assaults. The class which was afforded this lesser degree of police protection was almost exclusively female.

In 1984 a court recognized for the first time that a refusal of police departments to enforce the criminal laws when the victims were battered wives could constitute gender discrimination in violation of the equal protection clause of the Fourteenth Amendment, *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984). Other courts followed suit, *see e.g., Hynson v. City of Chester Legal Department*, 864 F.2d 1026 (3d Cir. 1988); *Balistreri v. Pacifica Police Department*, 855 F.2d 1421 (9th Cir. 1988). All of the earlier cases involved summary judgments. To the best of Petitioners' knowledge the instant cause is the first case to be decided on appeal after a full blown trial.

In the instant cause the Court of Appeals held that Petitioners failed to make a submissible case of gender discrimination because they failed to prove that the City's policy was motivated at least in part by a discriminatory purpose. The Court held that such proof could not be inferred from the much higher arrest rates for stranger assailants, 80% of whose victims were men, compared to domestic assailants, 90% of whose victims were women. The heart of the opinion of the Court of Appeals is this statement:

> Because of the inherent differences between domestic disputes and nondomestic disputes, legitimately different facts may affect a police

> officer's decision to arrest or not arrest in any given situation.

36 F.3d at 781. Since the unavoidable consequences of a legitimate policy will obviate an inference of discriminatory intent in cases of disparate impact, *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 n. 25 (1979), the Court of Appeals held that the lower level of police protection afforded the victims of domestic violence – who are nearly always women – was constitutionally permissible since it was based on a "legitimate" policy which recognizes the inherent differences between domestic and nondomestic disputes.

The fallacy in the opinion of the Court of Appeals is that the notion that there are "inherent differences" between domestic and nondomestic assaults has been overwhelmingly repudiated. The *Final Report* of the Attorney General's Task Force on Family Violence in 1984 recommended that law enforcement agencies establish arrest as the preferred response in cases of domestic violence. The United States Commission on Civil Rights recommended that, "Police departments should abandon policies of noninterference and arrest avoidance for domestic assaults." *Under the Rule of Thumb: Battered Women and the Administration of Justice*, A Report of the United States Commission on Civil Rights at 92 (1982). Petitioners presented expert testimony at trial that most experts, including the Police Foundation, encouraged a formal policy of presumptive arrest by the early 1980s. Indeed, in 1989 (two years after Marge Ricketts was murdered) the Missouri legislature enacted Senate Bill 420 which provided for mandatory arrest of persons who

assault their spouses in violation of orders of protection, R.S.Mo. § 455.085.2 (1994).

The Court of Appeals also found that the statistical differences in arrest rates for domestic and nondomestic assaults were of limited utility because of the impossibility of quantifying probable cause, 36 F.3d at 782, citing *Watson v. City of Kansas City*, 857 F.2d 690 (10th Cir. 1988).

It is certainly true that the presence or absence of probable cause may explain some of this discrepancy. Unfortunately, the extent of the effect of probable cause is problematic because "it is possible or perhaps even probable that officers' assessments as to whether probable cause exists are colored by whether the disturbance is domestic or nondomestic." *Watson, supra*, 857 F.2d at 695. The failure of Petitioners' statistics to account for every variable, such as probable cause, merely went to their weight which was, of course, a question for the jury, *Ibid.*

Experience teaches that it is unrealistic to expect the victim of discrimination to uncover the actual subjective intent of a decision-maker, *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J. Concurring). There will seldom be "eyewitness" testimony as to the mental processes of one who discriminates, *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983). If women are to have an effectual remedy to redress injuries caused by police policies that afford them a diminished level of protection of the law, then the only practical way to prove discriminatory purpose is by the disparate impact those policies have on women. This is especially so in light of the complete absence of any

salutary purpose behind the police department's policy which will provide a basis for a finding that the effects of the policy on women are unintended, *Feeney, supra.*

The practical consequence of the opinion of the Court of Appeals is to make it impossible to prove a prima facie case of gender discrimination when a police department chooses to afford battered women a lower level of protection. The legacy of that policy is the perpetuation of violence against women.

II. THIS CASE PRESENTS AN IMPORTANT ISSUE AS TO THE EXTENT TO WHICH A PLAINTIFF MUST PROVE THAT A POLICE DEPARTMENT'S POLICY OF NOT ARRESTING DOMESTIC ASSAILANTS IS A SUBSTANTIAL FACTOR IN CAUSING DOMESTIC VIOLENCE.

At the trial of this case Petitioners presented expert testimony about the emboldening effect on Sonny Stephens of the police department's failure to arrest him in spite of the repeated calls for assistance in September of 1986 and March to April of 1987. Specifically, they presented testimony that it was widely recognized in 1986 and 1987 that domestic offenders would be more likely to become increasingly violent if they were not arrested. Conversely, their experts also testified that arrest in domestic violence cases is a significant deterrent to spouse abuse.

This evidence is not limited to Plaintiffs' experts. The *Final Report* of the United States Attorney General's Task Force on Family Violence specifically recommended that law enforcement agencies establish arrest as the preferred

response in cases of family violence. In the commentary to this recommendation the *Final Report* notes at page 24 as follows:

> The results of [recent] research demonstrated that arrest and overnight incarceration are the most effective interventions to reduce the likelihood of subsequent acts of family violence. *A victim's chance of future assault was nearly two and a half times greater when officers did not make an arrest.*

(Emphasis added.) The commentary goes on to endorse the deterrent value of arrests.

The United States Commission on Civil Rights reached a similar conclusion: "Left unchecked, spouse abuse generally increases in severity as time passes, resulting in the victim's death in many cases." *Under the Thumb, supra,* at 91. The Civil Rights Commission could be speaking directly about the instant cause.

The Court of Appeals acknowledged that it was not necessary that Respondent's conduct be the sole proximate cause in order to allow recovery. "[I]t is enough that the defendant's fault was a substantial factor in producing the plaintiff's injuries. . . . " 36 F.3d at 779. The Court of Appeals also acknowledged that the question of whether a municipal policy caused the constitutional infringement is usually a jury question as long as the causal link is not too tenuous, *Ibid.* at 779-780. The Court concluded, however, that it was speculative to assume that Stephens would not have committed the crimes on April 7, 1987, if he had been arrested earlier:

> There is no question that Sonny harassed Kimberly while the two protection orders were in

> effect and that this constituted a violation of the protection orders for which Sonny was not arrested. While arrest or additional attention from the police *might* have dissuaded Sonny from continuing to harass Kimberly, . . . there is no evidence that a prior arrest for harassment would have prevented Sonny's unforeseen violent criminal acts on April 7, 1987.

(Emphasis in original.) 36 F.3d at 780.

The Court of Appeals' holding is simply counter to established principles of the law concerning causation. The instant cause is comparable to Prosser's lifeguard analogy:

> When a child is drowned in a swimming pool, no one can say with certainty that a lifeguard would have saved the child; but the experience of the community permits the conclusion that the absence of the guard played a significant part in the drowning. Such questions are peculiarly for the jury. . . .

W. P. Keeton, *Prosser and Keeton on the Law of Torts*, § 41, at 270 (5th ed. 1984).

No one can say with certainty that if the Columbia police department had arrested Stephens, he would never have murdered Mrs. Ricketts or raped Kimberly Roth. But the experience of the community – for example, in the form of the Attorney General's *Final Report* issued in 1984 – shows that a victim's chance of future assault was significantly increased when police officers do not make an arrest. Whether the policy of the Columbia police was a substantial factor in the tragedy of April 7, 1987, was

the kind of question "peculiarly for the jury. . . . " *Prosser, supra,* at 270.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3633

Paul Ricketts, Sr.,	*	
Plaintiff-Appellant,	*	
Paul Ricketts, Survivor of Marge Ricketts; Kimberly Stephens;	*	
Plaintiffs,	*	Appeal from the
Kimberly Roth,	*	United States District Court for the Western
Plaintiff-Appellant,	*	District of Missouri.
v.	*	
City of Columbia, Missouri, Defendant-Appellee,	*	
Ben White, Officer; Ernie Barbee, Chief of Police, City of Columbia; John Doe, Unknown Officers A-X; Lawrence Brady; Craig Klein; B. Arnold; Dennis Veach; Randy Boehm; Joseph Fagiolo; C. Antimi; L. Calvert,	*	
Defendants.	*	
---	*	
Association of Trial Lawyers of America,	*	
Amicus Curiae.	*	

Submitted: April 14, 1994

Filed: October 11, 1994

Before HANSEN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

HANSEN, Circuit Judge.

Kimberly Roth and her father, Paul Ricketts (the plaintiffs), appeal the district court's[1] grant of judgment as a matter of law in favor of the City of Columbia, Missouri, in their action brought pursuant to 42 U.S.C. § 1983. The plaintiffs sued the City alleging that it carried out a discriminatory custom of treating domestic abuse cases less seriously than nondomestic abuse cases, which was based upon an intent to discriminate against women. The plaintiffs contended that as a result of this custom, Kimberly's husband at the time, Sonny Stephens, harassed and sexually assaulted Kimberly and murdered her mother, Marge Ricketts. The district court set aside a jury verdict in favor of the plaintiffs in the amount of $1,200,000, concluding that the plaintiffs failed to establish the essential elements of their § 1983 equal protection claim. We affirm.

---

[1] The Honorable William A. Knox, United States Magistrate Judge for the Western District of Missouri, trying the case by consent of the parties pursuant to 28 U.S.C. § 636.

I. Background

Kimberly met Sonny Stephens in 1978. They began to live together shortly thereafter and married in 1982. Their relationship was riddled with argument and abuse. They temporarily separated several times, once because Sonny was incarcerated. When Sonny was at home, he often abused Kimberly both verbally and physically.

On September 11, 1986, Kimberly sought and received an *ex parte* order for protection from the Boone County Circuit Court. In her petition, she stated that she feared Sonny because he "has broke[n] my nose" and "threaten[e]d to kill me if I leave him." (Jt. App. at 224.) The Boone County Circuit Court ordered Sonny to refrain from "[a]busing, threatening to abuse, molesting or disturbing the peace of the petitioner . . . or [e]ntering the dwelling of petitioner, located at 909 Grand, Columbia, Mo." (*Id.* at 227.)

After obtaining the protection order, Kimberly and her five children moved from the court order protected location at 909 Grand into her parents' (Paul and Marge Ricketts') home at Holly Park Trailer Court. Sonny was visiting a friend who lived across the street from the Ricketts' home, and he saw Kimberly and her father return from the courthouse. Sonny became enraged and began yelling threats. Kimberly called the sheriff's office and requested that they serve Sonny with the protection order. The sheriff's office responded within ten minutes and served Sonny with the protection order. Paul Ricketts and the sheriff overheard Sonny say that he was going to get a shotgun, and Kimberly knew that Sonny had a shotgun in their home at 909 Grand. The Ricketts called

911 and officers searched the home at 909 Grand but were unable to find either Sonny or a shotgun. When Sonny returned to his friend's trailer across the street from the Ricketts' home, he had a sawed-off shotgun and he continued yelling threats. Kimberly called the police again, discovered that officers had been sent to 909 Grand, and requested protection at her parents' home. About 20 police officers responded to this call and surrounded the home. Sonny finally came outside, but without the shotgun. Eventually, Sonny was subdued. He was allowed to leave the area without being arrested.

That night, Kimberly's father's pickup truck was vandalized. When a police officer responded to a call about the vandalism the next morning, Kimberly told him that she was concerned about Sonny's shotgun and that she believed Sonny was keeping it in his friend's home across the street. The officer questioned Sonny's friend, who surrendered the weapon. During the next week, Sonny telephoned the Ricketts' home repeatedly, but Kimberly refused to talk with him. Sonny knocked on Kimberly's bedroom window one evening, and at another time, he threatened that if she did not return home he would kill her or someone in her family. Kimberly and her family called the police as a result of these threats, but Sonny was never arrested.

Only a week after receiving the protection order, Kimberly decided to go back to Sonny in an effort to protect herself and her family from his threats. Kimberly and the five children moved back into their home at 909 Grand, and on September 19, 1986, Kimberly and Sonny filed assigned document with the Boone County Circuit Court in which both parties consented to terminate the

protection order. The abuse worsened after Kimberly returned home, but Kimberly did not report further abuse to the police until March 20, 1987, when she again sought and received a protection order.

This second *ex parte* order of protection prohibited Sonny from, among other things, threatening, disturbing, or "enter[ing] upon the premises of [her] dwelling." (*Id.* at 234.) This order became a full order of protection on April 3, 1987. Despite the protection order, Sonny continued to call and threaten Kimberly and her family, often while sitting outside in the area around the Ricketts' home where Kimberly again was staying. Kimberly, her family, and her lawyer called the police several times during late March and early April 1987 due to Sonny's continued harassment, but Sonny was never arrested. On one occasion during that period, an officer came to the Ricketts' home to take a report. No physical abuse occurred or was reported after entry of the protection order.

On April 7, 1987, at about 7:30 a.m., Kimberly was in the living room of her parents' home with her mother and her youngest daughter when Sonny entered the home without notice and began an argument. Sonny threatened Kimberly with a shotgun (not the same shotgun previously confiscated). When Kimberly's mother attempted to intervene and calm the situation, Sonny shot her in the stomach. She died later that day. Sonny then dragged Kimberly away to a nearby woods, where he sexually assaulted her. He released her one-and-one-half hours later.

The plaintiffs, Kimberly and her father, filed suit pursuant to 42 U.S.C. § 1983 against the City of Columbia, Missouri, Police Department and several of its personnel, seeking to obtain compensation for the injuries caused by Sonny's conduct of continued harassment, sexual assault, and murder. The individual defendants were dismissed on grounds of qualified immunity, and the case went to trial against only the City. At trial, the plaintiffs argued that the City violated their rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution on the basis of sex discrimination. They contended through use of statistics and testimony that the City maintained a discriminatory custom of treating domestic abuse less seriously than nondomestic abuse cases, that victims of domestic abuse are most often women, and that this discriminatory custom caused their injury by "emboldening" Sonny to continue his abusive behavior without fear of arrest.

The jury returned verdicts in favor of the plaintiffs, specifically awarding Kimberly $200,000 for the harassment she endured while the protection orders were in effect and $200,000 for the sexual assault on April 7, 1987; and awarding the plaintiffs $800,000 for the April 7, 1987, murder of Marge Ricketts. The district court set aside the verdicts, granting the City's renewed motion for judgment as a matter of law. The district court assumed without deciding that the City had an unwritten policy or custom that resulted in unequal treatment of domestic assaults vis-a-vis nondomestic assaults and reasoned that the plaintiffs (1) failed to prove that the custom caused Marge Ricketts' death or Kimberly's rape, (2) failed to prove that the custom was intended to result in invidious

discrimination against women, and (3) failed to identify the final policymaker who had knowledge of the discriminatory custom. The plaintiffs appeal the district court's grant of judgment as a matter of law.

II. Discussion

"In reviewing the district court's grant of JAML [judgment as a matter of law], we apply the same standard that governed the district court." *Jacobs Mfg. Co. v. Sam Brown Co.*, 19 F.3d 1259, 1263 (8th Cir. 1994). Considering the evidence in the light most favorable to the nonmovant, judgment as a matter of law is not appropriate "unless all the evidence points one way and is susceptible of no reasonable inferences sustaining [the nonmovant's] position." *Id.*

Section 1983 provides a cause of action against any "person who, under color of any statute, ordinance, regulation, custom, or usage, of any State" causes the deprivation of a right protected by federal law or the United States Constitution. 42 U.S.C. § 1983. A municipality may be held liable as a "person" under § 1983. *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658, 690 (1977). A municipality is not constitutionally required "to protect an individual against private violence," but a municipality may not operate under a custom in which it "selectively den[ies] its protective services to certain disfavored minorities without violating the Equal Protection Clause." *DeShaney v. Winnebago County Dep't of Social Serv.*, 489 U.S. 189, 197 & n.3 (1989).

Whether a municipality discriminates against women by failing to treat complaints of domestic abuse as seriously as complaints of nondomestic abuse is a question of first impression in this circuit. Three other circuits, however, are not unfamiliar with the issue. *See McKee v. City of Rockwall*, 877 F.2d 409, 413 (5th Cir. 1989) (denying interlocutory appeal to the city for lack of jurisdiction, but addressing this equal protection issue with regard to the officers' claims of immunity), *cert. denied*, 493 U.S. 1023 (1990); *Hynson v. City of Chester*, 864 F.2d 1026, 1032-33 (3d Cir. 1988) (remanding this equal protection issue for consideration of the standard enunciated therein); *Watson v. City of Kansas City*, 857 F.2d 693, 696 (10th Cir. 1988) (affirming the grant of summary judgment in favor of the city on the plaintiff's gender discrimination claim). The following standard emerges from these cases:

> In order to survive summary judgment, a plaintiff must proffer sufficient evidence that would allow a reasonable jury to infer that it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and that the plaintiff was injured by the policy or custom.

Hynson, 864 F.2d at 1031 (footnote omitted) (citing *Watson*, 857 F.2d at 694).

We believe that this standard adequately sets forth the basic elements of proof under the framework of § 1983 because it requires the plaintiff to prove: (1) a

constitutional violation – that the municipality has a custom of providing less protection to victims of domestic abuse with an intent to discriminate against women on the basis of their gender, and (2) that the constitutional violation was caused by a person acting under color of state law – that the unconstitutional municipal custom caused the plaintiffs' injuries. We begin our analysis of the case at hand with the causation requirement.

A. Causation

Assuming the existence of an unconstitutional municipal custom, a § 1983 claimant cannot recover unless the claimant also proves that the custom caused the resulting injury. *See Monell*, 436 U.S. at 694. "[I]t is when execution of a government's policy or custom- . . . *inflicts* the injury that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694 (emphasis added). "Thus, our first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *Canton v. Harris*, 489 U.S. 378, 385 (1989). "[U]nder Missouri law of proximate causation, to which we may look in applying § 1983, it is enough that the defendant's fault was a 'substantial factor' in producing the plaintiff's injuries, and the defendant's fault need not have been the *sole* proximate cause in order to allow recovery." *Trudeau v. Wyrick*, 713 F.2d 1360, 1367 (8th Cir. 1983). Thus, the relevant inquiry for determining causation is as follows: "Would the injury have been avoided had" there not been

a municipal custom of treating domestic abuse less seriously than nondomestic abuse? Canton. 489 U.S. at 391.

Causation is generally a jury question unless, in a particular case, the question is "so free from doubt as to justify taking it from the jury." *Trudeau*, 713 F.2d at 1366-67. "As long as the causal link is not too tenuous, the question whether the municipal policy or custom proximately caused the constitutional infringement should be left to the jury." *Bielevicz v. Dubinon*, 915 F.2d 845, 851 (3d Cir. 1990).

In the case at hand, to find that the injuries caused by Sonny's violent acts of sexual assault and murder would have been avoided had Sonny been arrested for the prior harassment would be an exercise in pure speculation. Such speculation cannot establish causation because it is equally plausible that an arrest for the prior harassment might as easily have spawned retaliatory violence from Sonny. Holding that an officer's failure to arrest for one incident of harassment *causes* a subsequent incident of harassment or violence would essentially take away the officer's discretion to determine when to arrest – a fundamental part of our criminal system. *See McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) ("discretion is essential to the criminal justice process"). This in turn "would open municipalities to unprecedented liability under § 1983." *Canton*, 489 U.S. at 391. A municipality which, in order to protect itself against the kind of claim brought by the plaintiffs here, directed its officers to arrest every person against whom an allegation of spousal abuse was made would undoubtedly find itself facing Section 1983 claims of unconstitutional arrest without probable cause.

Additionally, the prior reported incidents of harassment here were too remote in time to constitute a proximate cause of the violent attack on April 7, 1987. The September 1986 shotgun incident occurred seven months before the April 7 incident, and no similar episodes occurred during the intervening period. The decisions not to arrest Sonny for the incidents of verbal harassment reported in late March and early April 1987 were closer in time but not so closely connected to or related to the April 7 attacks as to constitute a proximate cause of the attacks. There is no evidence that the police were called on April 7 and failed to respond. The evidence shows that the police were not called until after the violence occurred on April 7, so there was no realistic opportunity for the police to provide protection on that occasion.

The only causal link that might logically exist is a tenuous connection between the prior harassment, for which no arrests were made, and Sonny's continued harassment. There is no question that Sonny harassed Kimberly while the two protection orders were in effect and that this constituted a violation of the protection orders for which Sonny was not arrested. While arrest or additional attention from the police *might* have dissuaded Sonny from continuing to harass Kimberly, *see Bielevicz*, 915 F.2d at 851 ("it is logical to assume that continued official tolerance of repeated misconduct facilitates similar unlawful actions in the future") (citing *Brandon v. Holt*, 469 U.S. 464 (1985)), there is no evidence that a prior arrest for harassment would have prevented Sonny's unforeseen violent criminal acts on April 7, 1987. The violent acts were not foreseeable to the police because no

similar acts had been reported. We conclude that a reasonable jury could not have found that the police custom of disparate treatment, if it existed, was a substantial factor in producing Kimberly's rape or Mrs. Ricketts' murder.

B. Constitutional Violation

The plaintiffs argue that the district court erred by concluding that they did not set forth a submissible case on the issue of gender discrimination. Upon analysis, we agree with the district court.

Under the standard set forth in *Hynson* and *Watson*, an equal protection claim arises upon a showing that "it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, [and] that discrimination against women was a motivating factor" behind this policy or custom. *Hynson*, 864 F.2d at 1031; *see also Watson*, 857 F.2d at 694. We agree that if discrimination against women were the purpose behind a municipal custom of providing less protection for victims of domestic abuse, then an equal protection claim would arise. In this case, the plaintiffs demonstrated a pattern of fewer arrests in cases of domestic violence, but the plaintiffs failed to produce evidence from which a reasonable jury could determine that this pattern proved a policy which was motivated by an intent to discriminate against women.

When a widespread custom of a municipality impacts disproportionately on one gender, an equal protection violation arises "only if that impact can be traced to a

discriminatory purpose." *Personnel Admin. of Mass. v. Feeney,* 442 U.S. 256, 272 (1979). The disproportionate impact is only relevant to the extent that it "reflects a discriminatory purpose." *Washington v. Davis,* 426 U.S. 229, 239 (1976). A discriminatory purpose is more than a mere "awareness of the consequences." *Feeney,* 442 U.S. at 279. The law or custom must be found to have been implemented "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.*

When a municipal custom employs a facially neutral classification and its disproportionate impact on one gender is not susceptible to a neutral explanation, "impact itself would signal that the real classification made by the law was in fact not neutral." *Feeney,* 442 U.S. at 275. However, in only a few cases, where a facially neutral policy impacted exclusively against one suspect class and that impact was unexplainable on neutral grounds, has the impact alone signalled a discriminatory purpose. *See Gomillion v. Lightfoot,* 364 U.S. 339 (1960); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). When there is a rational, neutral explanation for the adverse impact and the law or custom disadvantages both men and women, then an inference of discriminatory purpose is not permitted. *See Feeney,* 442 U.S. at 275.

> [W]hen the adverse consequences of a law [or custom] upon an identifiable group are as inevitable as the gender-based consequences . . . a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry – made as it is under the Constitution – an inference is a working tool, not a synonym

> for proof. When, as here, the impact is essentially an unavoidable consequence of a [legitimate neutral policy or custom] the inference simply fails to ripen into proof.

Id. at 279 n.25. In sum, when determining whether there is a showing of discriminatory intent, disproportionate impact is but one factor to consider along with the inferences that rationally may be drawn from the totality of the other relevant facts. *See Davis*, 426 U.S. at 241.

The plaintiffs offered the expert testimony of Dr. Eve Buzawa who had gathered statistics indicating that the Columbia police department makes fewer arrests in domestic abuse cases than in nondomestic cases. Dr. Buzawa's opinion was based upon assault reports from portions of the previous year. Dr. Buzawa testified that the custom of disparate treatment for victims of domestic abuse adversely impacts women to a greater extent than men because over 90% of the victims of domestic abuse are women. The disproportionate impact is not exclusively suffered by women, however, because the classification itself is facially neutral and includes male victims of domestic abuse. There is no evidence that male victims of domestic abuse are treated differently than female victims of domestic abuse.[2]

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[2] The Equal Protection Clause requires the government to treat similarly situated persons similarly, and dissimilar treatment of those not similarly situated does not result in an equal protection violation. *Klinger v. Dep't of Corrections*, No. 93-2928, slip op. at 6 (8th Cir. Aug. 10, 1994) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)). A more accurate indicator of an intent to discriminate in this type of case would be a comparison of the arrest rate when men are

We must discern whether there is a rational explanation for the disparate impact on women. Because of the inherent differences between domestic disputes and non-domestic disputes, legitimately different factors may affect a police officer's decision to arrest or not to arrest in any given situation. Dr. Buzawa's statistics took into account some of the variables that affect a decision to arrest in domestic disputes, but we believe that not all of the differences that enter into the discretionary decision of whether to arrest[3] can be properly assessed and quantified through statistics. *See Watson*, 857 F.2d at 695 ("Whether or not probable cause exists is not susceptible to statistical quantification"). Police "discretion is essential to the criminal justice process." *McCleskey*, 481 U.S. at 297. "Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious." *Id.* at 313.

Because the statistical disparity alone does not signal an intent to discriminate against women, we look to whether the plaintiffs submitted any other evidence of a discriminatory intent. The plaintiffs introduced hearsay statements from members of the Ricketts family, but this evidence is insufficient. Kimberly's sister-in-law testified to statements allegedly made by a police officer to the effect that one man accused of domestic abuse should have been arrested before but was not. Kimberly's father

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victims of domestic abuse with the arrest rate when women are the victims. No such comparison was made in this case.

[3] We note that there was no mandatory arrest law governing the decision to arrest in a domestic abuse situation in Missouri at the time of the incidents involved in this case.

testified that he heard that one officer had been instructed not to arrest Sonny because Kimberly had gone back to him before and probably would again. (Trial Tr. at 1289-91.) These statements are unreliable hearsay. More importantly, while they might offer support for a discriminatory intent toward domestic disputes, they do not evidence an intent to discriminate against women.

The plaintiffs also offered evidence of a historic tolerance of domestic abuse in society and of one fairly recent newspaper statement. A Columbia officer was quoted as blaming a woman victim of domestic abuse for bringing on the assault herself. The officer explained that the context of the statement related only to one particular case where he had seen that happen. (Trial Tr. at 1238-40.) These were the only factors directly bearing on gender discrimination, and they do not combine to create a submissible inference of a discriminatory animus toward women by the Columbia police department. Although we are sympathetic to the plaintiffs and we acknowledge that they have suffered greatly from the criminal acts of Sonny Stephens, we conclude that the plaintiffs have failed to present evidence of an equal protection violation on the basis of gender.

Having disposed of the case on the basis of lack of causation and lack of a constitutional deprivation, we find it unnecessary to reach the plaintiffs' claim that the district court erred by requiring them to identify a final policymaker of the municipality.

III. Conclusion

We conclude that from the evidence submitted by the plaintiffs, no reasonable juror could find that the plaintiffs were injured as a result of a widespread custom of the City which was intended to discriminate against women. Thus, the district court did not err in granting the City's renewed motion for judgment as a matter of law, and we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

PAUL RICKETTS, SR., et al.,	)	
Plaintiffs,	)	No. 90-4099-CV-C-66BA
v.	)	(Filed Sep. 29, 1993)
CITY OF COLUMBIA, MISSOURI, et al.,	)	
Defendants.	)	

ORDER

Introduction

The events which led to the filing of this lawsuit are undeniably tragic and raise substantial questions concerning the liability of a municipality for the safety of its citizens.

Plaintiffs filed suit pursuant to the provisions of 42 U.S.C. § 1983, alleging their constitutional rights had been violated in several respects by the City of Columbia, Missouri, and several of its police officers and officials. The claims against defendants other than the City of Columbia, Missouri, were dismissed by the district court on the basis that those defendants were entitled to qualified immunity. The individual officers could not be held liable for damages because in 1986 and 1987, a reasonable officer would not have known that failure to arrest Sonny Stephens or act more aggressively in responding to plaintiffs' complaints might constitute a violation of plaintiffs'

constitutional rights. The parameters of the legal obligation of the police to respond to such incidents were not clearly defined in 1986 and 1987.

Municipalities, however, are not entitled to qualified immunity and may be held liable for violations of the Constitution, even when the law is not clearly defined at the time the incident occurs. *See Owen v. City of Independence, Mo.*, 445 U.S. 622, 638 (1980). Therefore, after written consent by the remaining parties, the case was transferred to the undersigned United States Magistrate Judge, pursuant to 28 U.S.C. § 636, for all further proceedings, including trial and entry of judgment.

Following an eight-day trial in March, 1993, the jury returned a verdict in favor of Kimberly Roth and Paul Ricketts, Sr., on their equal protection claims against defendant City of Columbia. Damages were assessed by the jury for Kimberly Roth at $200,000.00 on her claims relating to sexual assault on April 7, 1987, and at $200,000.00 on her claims relating to other harassment while orders of protection were in effect. The jury also assessed damages at $800,000.00 in favor of Kimberly Roth and Paul Ricketts, Sr., for the wrongful death of Marge Ricketts.

Thereafter, on March 31, 1993, defendant filed a renewed motion for judgment after trial, pursuant to Fed. R. Civ. P. 50(b), and alternative motions for a new trial or for remittitur. Plaintiffs have responded in opposition to defendant's motion and defendant has replied.

The issue before the court is whether the defendant City of Columbia is liable for the injuries inflicted by the criminal acts of Sonny Stephens[1] when

(1) he harassed Kimberly Roth;

(2) he sexually assaulted Kimberly Roth on April 7, 1987; and

(3) he murdered Marge Ricketts on April 7, 1987.

The acts of Sonny Stephens were his own individual acts. He was not acting in concert with any employee of the City of Columbia, or the Columbia Police Department. Further, the Columbia police had no advance warning Sonny Stephens was going to sexually assault Kimberly Roth on April 7, 1987, or going to kill Marge Ricketts on that date. Likewise, there is no evidence the police stood by or failed to respond to those incidents once notified. Thus, liability of the city cannot be based on a theory of accessory liability (acting in concert with Sonny Stephens) or failure to prevent a known threat (standing by and doing nothing on April 7, 1987).

Plaintiffs assert the city is liable because (1) it had a de facto policy of treating domestic disputes less seriously than other similar offenses or assaults; (2) the creation of the de facto policy was motivated by an intent to discriminate against women; and (3) the discriminatory policy caused or contributed to cause the injuries mentioned above. Plaintiffs contend the failure of the police

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[1] At the time of the incidents giving rise to this lawsuit, Sonny Stephens was the estranged husband of plaintiff Kimberly Roth.

to respond as aggressively as they do in nondomestic assault cases, pursuant to policy, "emboldened" Sonny Stephens, and therefore, the policy contributed to cause the attacks.

Defendant seeks judgment after trial on the basis that plaintiffs did not prove (1) defendant's policy caused plaintiffs' injuries; (2) the identity of the city's final policymaker; (3) an intent to discriminate; and (4) knowledge of a policy of discriminatory animus toward women by the city's final policymaker.

Defendant is correct that plaintiffs failed to prove defendant's policy (assuming it existed) was a legal cause of the injuries suffered by plaintiffs. There was no substantial evidence that, had the policy of the police department been different, the results would not have been the same. Plaintiffs also failed to prove the claimed policy was created with an intent to disfavor women and was adopted or acquiesced in by the city's final policymaker. Thus, the defendant's motion for judgment as a matter of law is granted on all claims. Defendant's motion for a new trial would have been granted but for the decision of the court to grant judgment for defendant.

Although the rulings on the legal issues in this case are adverse to plaintiffs, the court recognizes, and is not insensitive to, the anguish which plaintiffs endured and the pain which will continue. Nevertheless, the court may not base its rulings on sympathy, but must address the legal issues in accordance with the current state of the law.

Discussion

A motion for judgment after trial, under the provisions of Fed. R. Civ. P. 50(b), may be granted and judgment entered when the following are satisfied.

First, the motion for judgment after trial must be preceded by a motion for a directed verdict at the close of the nonmovant's evidence and at the close of all the evidence. Then, "the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." *Id.*

Second, the motion for judgment after trial must be filed within ten days after entry of judgment. *Id.*

Third, all the evidence must point one way and be susceptible of no reasonable inferences sustaining the position of the nonmovant. *Brown v. Syntex Laboratories, Inc.*, 755 F.2d 668, 671 (8th Cir. 1985). The court must consider all evidence in the light most favorable to the nonmovant, assume that the jury resolved all evidentiary conflicts in favor of the nonmovant, assume as true all facts the evidence tends to prove, and give the nonmovant the benefit of all favorable inferences that could be drawn from the facts that were proved. *Gilkerson v. Toastmaster, Inc.*, 770 F.2d 133, 136 (8th Cir. 1985); *Midwest Communications, Inc. v. Minnesota Twins, Inc.*, 779 F.2d 444, 455 (8th Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986).

The analysis the court engages in deciding a motion for judgment after trial and one for a new trial are different. In the latter, the court engages in a balancing process which results in a determination of whether a miscarriage of justice has occurred. *Goldsmith v. Diamond Shamrock*

Corp., 767 F.2d 411 (8th Cir. 1985). Thus, even though there is evidence to support a verdict, the trial court may grant a new trial. When there is enough evidence to support a claim such that reasonable persons might differ as to the conclusions of fact to be drawn, however, a motion for judgment after trial must be denied. C. Wright, *The Law of Federal Courts*, § 95 at 640 (1983).

This is a case of first impression in this circuit. Plaintiffs base their claim on a new legal theory addressed in *Hynson v. City of Chester*, 864 F.2d 1026 (3d Cir. 1988). Therefore, the court has relied on a variety of analogous cases in this circuit and on similar cases in other circuits. Similar attempts to hold local governmental organizations responsible for failure to protect the citizens of the community from crime have generally not been successful. *See DeShaney v. Winnebago County D.S.S.*, ___ U.S. ___, 109 S.Ct. 998 (1989); *Watson v. City of Kansas City, Kansas*, 857 F.2d 690 (10th Cir. 1988); *McKee v. City of Rockwell, Tex.*, 877 F.2d 409 (5th Cir. 1989).

It is worthy of note that none of the reported decisions directly on point have addressed post-trial matters and the proof required to make a submissible case at trial. Most of the reported decisions address either the doctrine of qualified immunity or whether there are sufficient facts in dispute to survive a motion for summary judgment. The cases have held that a municipality cannot be held liable under the due process clause for failing to protect an individual from private violence. Nevertheless, they have left open the possibility of suits against municipalities when the government selectively denies protection to certain disfavored minorities, in violation of the equal protection clause of the Constitution.

Equal Protection Standard

Discrimination on the basis of gender is subject to review under the equal protection clause of the fourteenth amendment. *Reed v. Reed*, 404 U.S. 71, 75 (1971). An intermediate standard of judicial review has been developed for gender-based discrimination claims. Under the intermediate standard, an intentional gender-based classification or difference in treatment will be upheld if it substantially relates to an important governmental interest. *Craig v. Boren*, 429 U.S. 190 (1976).

"Although there is no general constitutional right to police protection, the state may not discriminate [on the basis of gender] in providing such protection." *Watson v. City of Kansas City, Kan.*, 857 F.2d at 694 (citing *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977)). Plaintiffs have the burden of demonstrating discriminatory intent and must prove that a purpose to discriminate against women was a motivating factor in formation of the policy. *Watson* at 694. Furthermore, a plaintiff must normally produce evidence outside the facts of plaintiff's own case to support the allegation of an unconstitutional municipal policy. *Watson* at 695.

Three essential elements in plaintiffs' equal protection claim are that (1) defendant's policy caused or contributed to cause plaintiffs' injuries; (2) the policy was created or adopted by defendant's final policy-making authority; and (3) the policy was intentionally discriminatory towards women.

Plaintiffs have failed, as a matter of law, to prove these elements. Thus, the verdict will be set aside and judgment entered for defendant.

Causation

There was not sufficient evidence presented at trial from which a reasonable jury could find defendant's official policy[2] of treating domestic disputes less seriously than other disputes caused the death of Marge Ricketts or the sexual assault of Kimberly Roth.

A municipality may be held liable under section 1983 only where the municipality itself causes the constitutional violation at issue. *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978). *Respondeat superior* or vicarious liability is insufficient. *Monell* at 694-95.

"[P]roper analysis requires us to separate two different issues when a section 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." *Collins v. City of Harker Heights, Tex.,* ___ U.S. ___, 112 S.Ct. 1061, 1066 (1992). The first question is "whether there is a direct causal link between the municipal policy or custom and the alleged constitutional deprivation." *Canton v. Harris,* 489 U.S. 378, 385 (1989). "To establish proximate cause [under Missouri law], it is sufficient if there is substantial evidence which shows that the injury is a natural and probable consequence of the negligent act or omission." *Morrow v. Greyhound Lines, Inc.,* 541 F.2d 713, 718 (8th Cir. 1976). The

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[2] For purposes of this opinion, the court will treat the facts in the light most favorable to the nonmoving party and will assume, except as otherwise stated, there was sufficient evidence showing defendant had a policy of treating domestic disputes and assaults less seriously than nondomestic disputes and assaults.

parties may use circumstantial evidence from which the connection may be reasonably inferred. *Morrow* at 718.

Proximate cause has also been explained as follows:

> "An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

D.B. & W. § 80.18 (4th Ed. 1987).

Plaintiffs must prove the challenged conduct was a substantial or motivating factor in causing the injury. *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, (1977). "Proof merely that such a policy or custom was 'likely' to cause a particular violation is not sufficient; there must be proven at least an 'affirmative link' between policy or custom and violation; in tort principle terms, the causal connection must be 'proximate,' not merely 'but-for' causation-in-fact." *Spell v. McDaniel*, 824 F.2d 1380, 1388 (4th Cir. 1987). Plaintiffs have met neither the proximate nor the "but-for" causation test of the law.

The defendant in this case did not cause plaintiffs' injuries by murdering Marge Ricketts, sexually assaulting Kimberly Roth, conspiring with Stephens, or otherwise by aiding or abetting Stephens in his actions. The causes of Marge Ricketts' death and the sexual assault of Kimberly Roth on April 7, 1987, were the independent criminal acts of Sonny Stephens. The defendant, through its

police department, was not present at the time of the criminal acts on April 7, 1987, and was not notified prior to the criminal acts that there was an immediate danger. The police had no notice of the April 7, 1987, incidents until after the shooting of Marge Ricketts had occurred and the assault of Kimberly Roth had begun. Thus, the police department was not in a position on the morning of April 7, 1987, to have physically prevented the murder of Marge Ricketts or the assault of Kimberly Roth by Stephens.

Likewise, defendant did not take affirmative steps to place Marge Ricketts or Kimberly Roth in increased danger. Defendant took no part in the creation of the dispute between Stephens and Roth or in the creation of the relationship which caused the dispute to be labeled domestic. Clearly, the crimes committed by Stephens were acts of private violence.

The evidence indicated this was a stormy relationship which lasted many years. In the final year of the relationship, Kimberly Roth obtained her first order of protection and allowed it to lapse because of threats by Stephens. Approximately six months later, she obtained a second order of protection. In the interim, police were not notified of threats by Stephens or injuries suffered by plaintiffs, if any.

While the second order of protection was in effect, plaintiffs reported several incidents of harassment and minor disturbances to the police. These incidents may or may not have been violations of the protective order. Although plaintiffs expressed an abstract fear of Stephens, any escalation of violence or threats was not made

known to the police, who knew less of Stephens' violent nature than did plaintiffs.

Roth voluntarily talked to Stephens, alone, outside of the mobile home on at least one evening while the order of protection was in effect. Other contact with or by Stephens during this time was not reported to the police. Thus, the police department did not have a picture of the relationship from which they could have reasonably foreseen the devastating events of April 7, 1987.

Although plaintiffs presented some general evidence that defendant's policy may have "emboldened" Stephens, no evidence was presented showing the murder and assault by Stephens were the natural and probable results of that "emboldenment," that the policy caused Stephens to act criminally on April 7, 1987, or that the "emboldenment" was a substantial factor which lead to the ultimate injuries. The evidence simply did not show Stephens committed escalating acts of violence toward Kimberly Roth in response to police behavior over the period in question.

Plaintiffs' claim that the failure to deal more aggressively with Sonny Stephens "emboldened" him is speculative evidence of causation, at best. If this theory were sufficient under the law, every failure to arrest a person when there is probable cause could be deemed to be a cause of injuries inflicted by that person in like circumstances for the next six months, and would deprive police officers of any discretion in performing their duties. The law of causation does not extend liability that far. Plaintiffs have presented no evidence that if the police had

followed a different policy, the conduct of Sonny Stephens on April 7, 1987, would have been different.

If the police had exercised their discretion, conducted additional investigations, filed written reports, and arrested Stephens on the prior occasions[3] when Kimberly Roth called the police, it does not logically follow that the murder and sexual assault would have been, or probably would have been, prevented. Plaintiffs seem to assume the police should arrest every time there is probable cause to do so. The law does not require it and police policy did not require it in either domestic or nondomestic cases.[4]

Mere arrest following telephone calls to the police would not have assured plaintiffs that Stephens would have been in police custody. Plaintiffs did not show Stephens would not or could not have posted a bond as he did on a prior occasion.[5] Furthermore, violation of the protective order was a "Class A" misdemeanor, with relatively minor consequences. § 5.085.4(1) RSMo. 1980.

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[3] The evidence indicated that the two more serious incidents when police were called by plaintiffs, and Stephens was not arrested, were (1) five months, and (2) two weeks prior to the sexual assault and murder. The first incident is too remote in time to show a causal connection and the second incident appeared to have been diffused by the time police officers arrived.

[4] Certain states have now adopted statutes mandating arrests under particular circumstances in domestic abuse cases. Such a mandate was not in effect in Missouri during the times relevant to this lawsuit.

[5] Stephens had quickly made bond and was released by the judiciary when arrested for another matter in February, 1987.

It is pure conjecture to claim Stephens would not have murdered Marge Ricketts and assaulted Kimberly Roth on April 7, 1987, if he had been arrested six months or two weeks prior to that date. Thus, the part any policy may have had in emboldening Stephens to commit these acts is too speculative under the facts of this case to show a direct causal link. *See S. v. D.*, 410 U.S. 614, 618 (1973) (no showing that prosecution of third party would have resulted in relief from plaintiff's injury).

While official tolerance (through policy) of repeated misconduct may facilitate similar unlawful actions in the future, *Bielevicz v. Dubinon*, 915 F.2d 845, 851 (3d Cir. 1990), the actions in this case are not similar in nature to Stephens' previous actions of harassment and verbal threats which were known to the police. The evidence did not tend to prove any official tolerance by defendant of misconduct in domestic disputes causing serious injury or of treating serious injury cases differently than non-domestic serious injury cases. Plaintiffs' own statistics show that in cases of major or serious injury to domestic violence victims, arrests were slightly more likely to be made than in nondomestic cases. (Pl. Ex. 34, table 13.)

Therefore, plaintiffs have submitted insufficient evidence, as a matter of law, to prove the injuries inflicted on Marge Ricketts and Kimberly Roth on April 7, 1987, were caused by defendant's policy of treating domestic violence calls less seriously than similar calls which were not domestic in nature.

Plaintiffs have submitted marginally sufficient evidence, however, for the jury to conclude defendant's policy contributed to cause some harassment of Kimberly

Roth while the orders of protection were in effect. Nevertheless, as will be discussed later, plaintiffs have failed to prove the de facto policy was the official policy of the city, and have failed to prove gender animus.

Even if plaintiffs had proven the other elements of the claim relating to harassment, a new trial would have been required. The evidence relating to the subsequent murder and sexual assault, the inclusion of state statutes in the jury instructions and evidence relating to the due process claims for which a directed verdict was entered, and a general confusion of the facts and legal issues relevant to that claim clearly affected the jury award on that claim. Thus, in light of the prejudicial error and lack of substantial justice on that claim, a new trial would have been ordered.

Identification of Final Policymaker and Knowledge of Custom

"Official policy involves 'a deliberate choice to follow a course of action * * * made from among various alternatives' by an official who has the final authority to establish governmental policy." *Jane Doe A v. Special Sch. District*, 901 F.2d 642, 645 (8th Cir. 1990) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). State law identifies who has the final authority to make policy. *Jane Doe A* at 645. "Mere authority to exercise discretion while performing particular functions does not make a municipal employee a final policymaker unless the official's decisions are final and unreviewable and are not constrained by the official policies of superior officials." *Feliciano v. City of Cleveland*, 988 F.2d 649, 655 (6th Cir.

1993) (Chief of Police subordinate to Director of Public Safety pursuant to Cleveland, Ohio Code).

Defendant asserts the court erred in failing to grant judgment as a matter of law because plaintiffs "failed to produce any evidence, by way of municipal ordinances or regulations, identifying the City of Columbia's policy-maker or law maker whose edicts or acts may fairly be said to represent the official policy of the City of Columbia." (Doc. 184, p.2).

Defendant is correct that plaintiffs failed to produce evidence at trial which identified the person or persons with final policymaking authority for the City of Columbia or evidence that the person or persons with final policymaking authority had knowledge, and actual or constructive, of the policy of treating domestic dispute cases differently.

In *City of St. Louis v. Praprotnik*, 485 U.S. 112, 126 (1988), the Court stated "a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it. And certainly there can be no justification for giving a jury the discretion to determine which officials are high enough in the government that their actions can be said to represent a decision of the government itself." The authority to make municipal policy is necessarily the authority to make final policy. *Praprotnik* at 127.

At trial, plaintiffs produced no evidence which identified the final policymaker for the defendant on these matters, whether the Chief of Police was that person, or whether the Chief's decisions were subject to review and

final approval by others within the city. Plaintiffs merely assumed the final policymaker (whoever it was) had actual or constructive knowledge[6] of the de facto[7] policy to treat domestic disputes less seriously. In this regard, the jury instruction identifying the chief of police as the final policymaker was in error. The court implicitly took judicial notice that the chief of police was the city's final policymaker. The court had no authority to do so. *See, e.g., Bryant v. Liberty Mutual Ins. Co.*, 407 F.2d 576 (4th Cir. 1969); *Ruhs v. Pacific Power & Light*, 671 F.2d 1268 (10th Cir. 1982); *Long v. J.R.*, 687 S.W.2d 255 (Mo. App. 1985).

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[6] In an analogous case, the United States Circuit Court of Appeals for the Eighth Circuit held "that to establish the existence of a governmental custom or failure to receive, investigate, or act on complaints of violations of constitutional rights, a plaintiff must prove:

1) the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees;

2) deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and

3) that plaintiff was injured by acts pursuant to the governmental entity's custom, *i.e.*, that the custom was the moving force behind the constitutional violation."

Jane Doe A. v. Special Sch. District, 901 F.2d 642, 646 (8th Cir. 1990).

[7] Plaintiffs assert the City had a de facto policy of treating domestic disputes less seriously than nondomestic disputes. The written policy of the police department did not discriminate between these types of disputes, and state statute directed the same standard for response be used. Plaintiffs produced evidence, however, that the police had an unwritten custom of treating such disputes differently and less seriously, and that the unwritten custom amounted to a de facto policy of the department.

Without identifying the final policymaker, plaintiffs could not show the final policymaker had knowledge of the policy to discriminate. Knowledge of the discriminatory policy was a necessary element to be proved by plaintiffs. Constructive knowledge by police could be inferred from the evidence, but not knowledge by anyone outside the police department.

The documents submitted by plaintiffs in their response to defendant's motion which attempted to identify the final policymaker for defendant were not admitted into evidence at trial and will not be considered by the court at this stage in the proceedings. Plaintiffs' arguments that they can be considered by the court after the trial are not persuasive.

Intent to Discriminate and Policy of Discriminatory Animus toward Women

Defendant asserts plaintiffs failed to show that the policy of treating domestic violence victims differently than nondomestic violence victims resulted from bias toward women.

As several Supreme Court cases recognize, "when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work. But those cases signaled no departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results." *Personnel Adm'r of Massachusetts v. Feeney,* 442 U.S. 256, 273 (1979) (veteran hiring preference held not gender-based although over 98 percent of veterans were male). *See also Washington v. Davis,* 426 U.S. 229 (1976) and

Arlington Heights v. Metropolitan Housing Dev. Corp, 429 U.S. 252 (1977). "When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second inquiry, impact provides an 'important starting point,' but purposeful discrimination is 'the condition that offends the Constitution.' " *Feeney,* 442 U.S. at 274.

Although the case before the court involves a policy rather than a statute, the rule of law is equally applicable. The policy dealing with domestic violence, as set forth at trial, is gender neutral, but has a disproportionately adverse impact on women. Victims of domestic violence are not uniquely female; they include males, females, the elderly, and children of both sexes. The question then is whether plaintiffs have shown that a gender-based discriminatory purpose has, at least in some measure, shaped the policy on handling domestic violence calls for assistance.

To show discriminatory intent, plaintiff's offered evidence of statements made by police officers in certain situations. The comment "that's the way it goes," made in response to nonenforcement of a protective order and that the department was not "run right" does not outwardly show discriminatory intent toward women. Another comment that no arrest of Stephens should be

made unless he was doing something illegal[8] because Roth would simply get back together with Stephens, also does not show a discriminatory intent toward women. It may, however, show a discriminatory intent toward domestic disputes. Regina Turner's statements to a domestic dispute victim that the department would not enforce her order of protection, like the statements above, show a bias against domestic disputes but not necessarily against gender.

The only truly gender-based statements offered into evidence were taken from a newspaper statement in which a police supervisor said that women victims are partly to blame for assaults by their husbands because of nagging. The evidence presented by defendant was that this statement was made in connection with a single incident and was taken out of context by the newspaper and the plaintiffs.

Other evidence indicated a difference in arrest rates and the number of written reports for domestic versus nondomestic disturbances in which the police were called. Plaintiffs provided evidence that domestic dispute victims were nearly all women, and thus, there was an adverse impact on women from which bias toward women may be inferred. That showing of an inference of bias against women, however, is flawed by a lack of

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[8] As a general rule, arrests are not made unless an individual is doing something illegal or is believed to have done something illegal. Violation of the protective order was illegal activity pursuant to state statute; thus, the comment on its face does not necessarily mean that Stephens should not have been arrested.

comparison with the number of nondomestic disturbances including women and the arrest and report rates for those situations. *See McKee*, 877 F.2d 409 (5th Cir. 1989).[9] Plaintiffs implied, without producing evidence at trial, that the vast majority of nondomestic disputes involved only men.

In other words, plaintiffs produced evidence of only what happens when women make calls regarding domestic violence, but no comparison with treatment of women who make calls concerning nondomestic violence. Furthermore, the arrest rate figures do not indicate why arrests were not made, *i.e.*, because of a lack of probable cause, the situation had been diffused and the caller did not want the person arrested, or for some other legitimate or illegitimate reasons.

The evidence did not show the police department failed to respond[10] to domestic disturbance calls or that

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[9] In *McKee*, the court noted problems with plaintiff's statistics, including the "wide variety of factors which might influence the likelihood that police would make an arrest: whether the assault was in progress when police arrived; whether a gun or knife had been used; whether the victim had suffered obvious physical injuries and required medical attention; and whether the victim refused to press charges when the police arrived. Third, the statistics do nothing to suggest gender-based discrimination. The statistics do not indicate how many of the victims in the cleared assault cases were women, or how many of the victims in the domestic violence cases were men." *McKee* at 415.

[10] Plaintiffs presented evidence of a Missouri statute which required police to "apply the same standard for response" to domestic violence calls as applied to any like offense involving strangers. § 455.080.2 RSMo. 1980. The statute also required that

the response time for such calls was different from non-domestic disturbance calls. The only evidence plaintiffs submitted regarding the police department's failure to respond, as opposed to failure to arrest and write reports, was with regard to plaintiffs' own family. As set forth above, a plaintiff must normally produce evidence outside the facts of plaintiff's own case to support the allegation of unconstitutional custom or policy. *Watson* at 695.

Plaintiffs also argued the lack of separate written policy for handling domestic dispute calls showed a bias toward women. A fair reading of the statute requiring police departments to apply the same standard to domestic and nondomestic calls, however, might foreclose a separate written policy. § 455.080.2 RSMo 1980. Arguably, a separate written policy, unless it contained identical language, would create a different standard, such that the creation of a separate written policy would violate the statute. The absence of a separate written policy does not support plaintiffs' assertion of gender bias in this case.

Plaintiffs' historical evidence of discrimination against domestic violence complainants by police departments overall, and the gender-based nature of such discrimination, is little support for the proposition that the

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such calls not be treated with a lower priority. Plaintiffs' position appears to be that the statutes require the police to handle the calls identically from start to finish, not just respond to them in the same way. While the statute is applicable to the due process claim because it arguably gives rise to a special duty to protect victims of domestic disputes, the equal protection claims submitted to the jury are not based on the statute but are based on the police department's policy.

policy in Columbia was gender motivated, rather than due to dislike for domestic disputes.

The evidence in this case suggests a bias against domestic dispute calls, but does not meet the quantum of proof required to submit to the jury on the basis of gender bias.

Governmental Interest

The final part of an analysis of gender-based discrimination claims is whether the difference in treatment, if any, substantially relates to an important governmental interest. *Craig*, 429 U.S. 190 (1976). Defendant did not concede a difference in treatment; thus, evidence directed toward showing the difference was substantially related to an important governmental interest was not introduced, and that portion of the law was not submitted in the jury instructions. Sufficient evidence was presented regarding police training and the reasons for certain responses to domestic situations at a time when there was substantial dispute among experts as to the appropriate response to domestic disturbance calls to establish a rational basis for a difference in treatment of domestic from the nondomestic dispute cases.

New Trial

Defendants alternatively seeks a new trial because the jury's verdict was against the weight of the evidence, the court permitted improper evidence, there was error in the jury instructions, and error in certain other areas.

"Generally, new trials are granted only if the record presents prejudicial error or substantial justice has not been done." *Comerio v. Beatrice Foods Co.*, 616 F.Supp. 1423, 1428 (E.D. Mo. 1985). The burden of demonstrating the verdict was against the weight of the evidence or showing prejudicial error is on the moving party. *Id.*

If the only element plaintiffs had failed to prove was causation, a new trial would be required on plaintiffs' claim for harassment. On the harassment claim, there was sufficient evidence of causation to allow the issue to go to the jury, but the claim would require submission to the jury without their having heard the evidence of the tragic death and assault of April 7, which were not caused by defendant's policy.

Prejudgment Interest and Attorney Fees

On March 29, 1993, plaintiffs filed a motion for the assessment of prejudgment interest pursuant to the provisions of § 408.040.2 RSMo (1987). Defendant has responded in opposition thereto and plaintiffs have replied. Plaintiffs have also submitted a request for attorney fees, and defendant has responded. These issues, however, are moot in light of the court's ruling.

IT IS, THEREFORE, ORDERED that defendant's motion of March 31, 1993, for judgment after trial is granted and judgment is entered in favor of defendant. [184-1] It is further

ORDERED that defendant's motion of March 31, 1993, for a new trial is denied as moot. [184-2]. It is further

ORDERED that defendant's motion of March 31, 1993, for remittitur is denied as moot. [184-3] It is further

ORDERED that plaintiffs' motion of May 6, 1993, for oral argument on the pending motions is denied. [200] It is further

ORDERED that plaintiffs' motion of March 26, 1993, for an assessment of prejudgment interest is denied as moot. [182] It is further

ORDERED that plaintiffs' motion of April 1, 1993, for attorney fees is denied as moot. [186]

Dated this 29 day of September, 1993.

/s/ William A. Knox
WILLIAM A. KNOX
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3633WMJC

Paul Rickerts [sic], Sr., et al.,	*	
Appellants,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
vs.	*	
City of Columbia, MO, et al.,	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. Chief Judge Arnold, Judge McMillian and Judge Murphy would grant the petition for rehearing with suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

December 9, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit